

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  IOWA TELECOMMUNICATIONS SERVICES, INC., d/b/a IOWA TELECOM	DOCKET NO. RPU-02-4
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**ORDER GRANTING APPLICATION FOR REHEARING OR RECONSIDERATION  
AND REQUEST FOR CONFIDENTIAL TREATMENT**

(Issued September 22, 2003)

**Background And Procedural History**

On January 15, 2003, Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom (Iowa Telecom), filed a "Request that Material be Withheld from Public Inspection." Specifically, Iowa Telecom requested that the following information be treated as confidential:

- Portions of the Application for Rehearing and Stay at pages 3, 4, 6, 9, 10, 13, 15, 19, and 30.
- Portions of Attachment A to the Application for Rehearing and Stay – Affidavit of Lawrence Zawalick
- Attachment C to the Application for Rehearing and Stay-Capital Reconciliation
- Attachment D to the Application for Rehearing and Stay-Preferred Stock Redemption

In support of its request, Iowa Telecom noted that 199 IAC 1.9(5)"a"(1) and (3) and Iowa Code §§ 22.7(3) and (6) authorize the Utilities Board (Board) to withhold from public inspection trade secrets recognized and protected as such by law and reports

made to the Board which, if released, would give advantage to competitors and serve no public purpose. Additionally, Iowa Telecom asserted that the information, financial in nature, qualifies as "trade secrets" pursuant to Iowa Code § 550.2(4) and further indicates that Iowa Telecom had used "reasonable efforts to maintain the secrecy of the Iowa Telecom financial information" without specifying or describing those efforts.<sup>1</sup>

The Board previously issued three orders granting Iowa Telecom requests for confidentiality in this docket on July 8, August 15, and August 22, 2002. The July 8, 2002, order related to information consisting of specific access line counts, financial reports and information, employee reduction counts, re-financing information, strategic planning information, market and product information, specific customer information, and information contained in Iowa Telecom's network improvement plan. The Board's order issued August 15, 2002, addressed financial information and end-user revenue information. In its order dated August 22, 2002, the Board ruled on a request for confidential treatment of information consisting of forecasts of revenues, expenses, and debt service, the general assumptions underlying those forecasts, and a description of a proposed new debt structure.

Each of the previous orders granted confidential treatment pursuant to the provisions of Iowa Code § 22.7(6), which provides for confidential treatment for

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<sup>1</sup> "Request That Material Be Withheld From Public Inspection," p. 2.

public records which are reports to government agencies and which, if released, would give advantage to competitors and serve no public purpose.

On January 21, 2003, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a "Resistance" to Iowa Telecom's January 15, 2003, request for confidential treatment, asking the Board to deny the request and, further, "to reverse all previous orders granting such requests of Iowa Telecom in this case."<sup>2</sup>

Consumer Advocate argued that Iowa Telecom had relinquished its previous and current claims pursuant to Iowa Code §§ 22.7(3) and (6). Iowa Code § 550.2(4) requires that in order to qualify as a trade secret, information must be the subject of efforts that are reasonable under the circumstances to maintain its secrecy. In its "Application for Rehearing," Iowa Telecom stated that it had disclosed "all of this information" to the Legislature in its efforts to encourage the enactment of SF 429. Consumer Advocate argued that Iowa Telecom could not claim the information should be withheld after having voluntarily released the information to the Legislature.

On January 28, 2003, Coon Rapids Municipal Utilities, Grundy Center Municipal Communications Utility, Harlan Municipal Utilities, Reinbeck Municipal Telecommunications Utility, Manning Municipal Communication and Television System Utility, and The Community Cable Television Agency of O'Brien County,

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<sup>2</sup> Resistance, p. 3.

d/b/a The Community Agency and TCA, in regard to the cities of Harley, Paullina, and Primghar only (collectively, Municipal Intervenor), filed a resistance to the request of Iowa Telecom and concurred with Consumer Advocate's arguments and comments.

In a response filed January 31, 2003, Iowa Telecom argued that all the specified information should be protected as trade secrets under Iowa Code § 22.7(3). As evidence for its argument, Iowa Telecom stated that "much" of the information provided to legislators was general in nature. However, Iowa Telecom admitted that specific, detailed financial information was made available to a limited number of key legislative personnel. Iowa Telecom did not offer a detailed description of the information or the circumstances surrounding the disclosures.

On August 5, 2003, the Board issued an order denying Iowa Telecom's January 15, 2003, request for confidential treatment on the grounds that Iowa Telecom waived confidentiality by disclosing the information to nonemployees without taking any apparent steps to protect the confidential nature of the information. To the extent the information requested by Iowa Telecom in its January 15, 2003, request was the same information that has been the subject of previous Board orders on July 8, August 15, and August 22, 2002, the Board reversed its previous orders approving requests for confidentiality.

On August 15, 2003, Iowa Telecom filed a request for a stay of the release of the information and asked that it be given until August 25, 2003, to file an application for rehearing or reconsideration of the Board's ruling and to provide additional

information to demonstrate that Iowa Telecom has, in fact, taken reasonable steps to protect the secrecy of the information in question. The Board granted the request for stay on August 18, 2003.

### **Iowa Telecom's Application For Reconsideration**

On August 25, 2003, Iowa Telecom filed its "Application For Rehearing Or Reconsideration," offering a new affidavit which, when combined with the information previously filed by Iowa Telecom, shows that Iowa Telecom revealed financial information to an unspecified number of Iowa legislators, information that Iowa Telecom considers to be confidential. Specifically, in January of 2003, Iowa Telecom prepared a packet of confidential financial information to show to certain legislators. The packet included Iowa Telecom's first-year financial results. The packets were shown to legislators with the "express understanding that the information would be kept confidential."<sup>3</sup> Each document in the packet was labeled "confidential." In most cases, the legislators did not keep the packet; only three members of the Legislature kept the packet and each one expressly agreed, orally, to keep the information confidential.

After the other parties challenged Iowa Telecom's request for confidential treatment, Iowa Telecom obtained written confidentiality agreements from the three legislators who kept the packets, to memorialize the prior oral agreements.

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<sup>3</sup> Supplemental Affidavit of David M. Anderson, para. 2, attached to Iowa Telecom's August 25, 2003, application for reconsideration.

Iowa Telecom argues that these procedures are consistent with the relevant case law defining "trade secrets," in that disclosure was made only to those with a need to know, subject to a requirement that the information be kept confidential. Iowa Telecom argues that in order to meet the statutory criteria for trade secret protection, a party must show that the trade secret was the subject of efforts that were reasonable under the circumstances to maintain its secrecy, citing Revere Transducers, Inc., v. Deere & Co., 595 N.W.2d 751, 776 (Iowa 1999). The trade secret need not be absolutely secret to be protected; reasonable precautions to protect secrecy will suffice. Pioneer Hi-Bred Intern. V. Holden Foundation Seeds, Inc., 35 F.3d 1226, 1235 (8th Cir. 1994). Limited disclosure to persons who are obligated to maintain the secrecy of the information does not destroy trade secret protection. Third Restatement of Unfair Competition § 39, comment f, at 432; White Pigeon Agency, Inc., v. Madden, No. 1-203/00-1189 (Iowa App. 7/31/2001) (the information "need only be protected from disclosure to the public"). Iowa Telecom also relies on Des Moines Register v. Dwyer, 542 N.W.2d 491 (Iowa 1996), for the proposition that legislators can receive confidential information and such disclosures do not automatically constitute a public disclosure.

### **Municipal Intervener Resistance**

On September 3, 2003, the Municipal Intervenors filed a resistance to Iowa Telecom's application for reconsideration, asserting that the act of sharing trade secrets with nonemployees is a waiver of the trade secret claim, even if the

nonemployees agree to hold the information confidential. The Municipal Intervenors cite no authority for this proposition.

The Municipal Intervenors also assert that Iowa Telecom has not shown that the legislators had the authority to agree to keep the information confidential; that Iowa Telecom has never before released confidential information without a written confidentiality agreement; and that Iowa Telecom could have filed all of the information in its new affidavit with its original request for confidential treatment and Iowa Telecom has not offered any reason for its failure to offer adequate information at the outset.

The Municipal Intervenors next argue that, as a matter of public policy, information disclosed to members of the Legislature should be considered to be a public record subject to Iowa Code chapter 22. The Municipal Intervenors distinguish the Dwyer case because it involved a Senate rule saying that the relevant information would be held confidential; no similar Senate rule has been cited by Iowa Telecom. The Municipal Intervenors argue that Dwyer should be read narrowly and does not apply to this case.

### **Consumer Advocate Answer**

On September 8, 2003, Consumer Advocate filed an answer to Iowa Telecom's request for reconsideration, asserting that Iowa Telecom has admitted that it uses more restrictive confidentiality measures with its own employees than it used with the legislators. Consumer Advocate concludes that, as a result, Iowa

Telecom has failed to show that it took reasonable steps under the circumstances to protect the confidentiality of its information. Consumer Advocate also argues that Iowa Telecom's reliance on Dwyer is misplaced, because that case involved the separation of powers between the three branches of government and is not relevant here. The issue in this case, according to Consumer Advocate, is whether Iowa Telecom waived confidentiality by reason of its failure to take reasonable steps in the circumstances to protect the confidentiality of its trade secrets. Consumer Advocate argues that Iowa Telecom waived confidentiality.

### **Analysis**

The issue before the Board is whether Iowa Telecom has waived confidentiality of the information at issue by sharing the information with members of the Iowa Legislature under the conditions described above. Thus, arguments about whether the information should be confidential in the hands of the Legislature are beyond the Board's capacity to resolve; even the Iowa Supreme Court has recognized that the House and the Senate may make their own rules regarding the manner in which they communicate on matters of legislation with the public. Des Moines Register v. Dwyer, 542 N.W.2d 491, 499 (Iowa 1996). The question of whether Legislative records are subject to public release is a nonjusticiable political question, Id. at 501, and is not for the Board to address.

No party has disputed whether the information would qualify as a trade secret in the absence of disclosure, and no party has disputed Iowa Telecom's affidavits



regarding the basic facts and circumstances. Instead, the arguments have centered around the question of whether Iowa Telecom took steps that were reasonable under the circumstances to protect the confidential nature of its information when it shared the information with members of the Legislature.

Such precautions may take many forms. According to the Third Restatement Of Unfair Competition, § 39, comment g, they may include physical security to prevent unauthorized access, procedures limiting disclosure to those with a need to know, and measures that emphasize to the recipient the confidential nature of the information, such as nondisclosure agreements, signs, and restrictive legends. Here, Iowa Telecom took actions that appear to fit within each of these categories of sufficient precautions. Iowa Telecom used physical security measures when it assembled the packets, showed them to legislators, and then retrieved the packets from all but three of the legislators. Iowa Telecom limited disclosure to those who, in Iowa Telecom's opinion, had a need to know by selecting the members of the legislature who would be permitted to review the information. Iowa Telecom included at least a form of a restrictive legend on the documents (each page bore the legend "Iowa Telecom Confidential"). Finally, Iowa Telecom shared the information with the members of the legislature pursuant to oral nondisclosure agreements and, for those three legislators who were permitted to keep the information packets, by written agreement, albeit after the fact. Under the Dwyer decision, discussed above, and based on these specific facts, it cannot be said that Iowa Telecom's reliance on those oral and written agreements was unreasonable.

The Board finds that, based on the uncontested facts recited above, Iowa Telecom's trade secrets were the subject of efforts that were reasonable under the circumstances to maintain the secrecy of the information. The Board is not endorsing Iowa Telecom's actions in this respect or guaranteeing that future cases with minor fact differences will lead to the same conclusion. Clearly, Iowa Telecom could more easily show that it had taken reasonable steps to protect its secrets if the written confidentiality agreements had been executed before the confidential information was shared. Moreover, that would have allowed Iowa Telecom to have made the necessary showing in February, when the issue of waiver was first raised, saving time and effort for the other parties and the Board.

For these reasons, the Board finds the confidential information filed by Iowa Telecom on January 15, 2003, and confidential information previously filed by Iowa Telecom in this docket, should be held confidential under the provisions of Iowa Code § 22.7(3), as trade secrets which are recognized as such and protected by law.

Because the Board has concluded that the information should be held confidential pursuant to Iowa Code § 22.7(3), the Board will not address the claim that the information should be held confidential pursuant to Iowa Code § 22.7(6).

**IT IS THEREFORE ORDERED:**

1. The "Application For Rehearing Or Reconsideration" filed in this docket by Iowa Telecommunications Services, Inc., on August 25, 2003, is granted. The Board's "Order Denying Request To Withhold Information From Public Inspection," issued in this docket on August 5, 2003, is reversed. The Board's prior

orders granting confidential treatment, issued in this docket on July 8, August 15, and August 22, 2002, are reinstated.

2. The "Request That Material Be Withheld From Public Inspection" filed by Iowa Telecommunications Services, Inc., on January 15, 2003, is granted pursuant to the provisions of Iowa Code § 22.7(3).

3. The information shall be held confidential by the Board subject to the provisions of 199 IAC 1.9(8)"b"(3).

**UTILITIES BOARD**

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 22<sup>nd</sup> day of September, 2003.